TAX APPEALS COMMISSION

115TACD2021

[redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. Following the execution of a Compromise Agreement and the termination of employment with [redacted] (the Firm), the Appellant became entitled to settlement payment (Payment) of €180,000. It is the Respondent's position that the entire Payment be subject to income tax pursuant to Taxes Consolidation Act 1997 (TCA), section 123 as a payment received on the retirement or removal from an office or employment.

2. The Appellant accepted that while some of the Payment could be liable to income tax under TCA, section 123, he argued that a significant proportion of the Payment was exempt from tax based on the following provisions:

   (a) TCA, section 201(2)(a)(i)(II) as a payment received "*on account of injury to or disability of the holder of an office or employment*",
   (b) TCA, section 192A as a payment made under relevant employment legislation providing for the protection of employees, or
   (c) TCA, section 613(1)(c) as "*compensation or damages for any wrong or injury suffered by an individual in his or her person or in his or her profession*"

Legislation

3. Subject to the certain statutorily prescribed exemptions, TCA, section 123 imposes a charge to tax under Schedule E in respect of, *inter alia*, compensation payments for loss of office where those payments would otherwise escape tax under the general

charging provision, TCA, section 112. The relevant provisions of TCA, section 123 provides as follows:

> (1) *This section shall apply to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments, including any payment in commutation of annual or periodical payments (whether chargeable to tax or not) which would otherwise have been so made.*
>
> (2) *Subject to section 201, income tax shall be charged under Schedule E in respect of any payment to which this section applies made to the holder or past holder of any office or employment, or to his or her executors or administrators, whether made* by *the person under whom he or she holds or held the office or employment or by any other person.*

4. The charge to tax in accordance with TCA, section 123 can be ameliorated by the exemptions and reliefs contained within TCA, section 201 and Schedule 3.The Appellant sought to be exempt from income in accordance with TCA, section 201(2)(a) which states:

> *"Income tax shall not be charged by virtue of section 123 in respect of the following payments:*
>
> *(i) an amount not exceeding €200,000 of any payment made—*
>
> *(I) in connection with the termination of the holding of an office or employment by the death of the holder, or*
>
> *(II) on account of injury to or disability of the holder of an office or employment"*

5. Certain other payments are also exempt from tax in accordance with TCA, section 192A where those payments are made, *inter alia*, to an employee by the employer or former employer under a 'relevant Act' in respect of a recommendation, decision or determination under that Act by a 'relevant authority'. The exemption also extends to a settlement arrived at under a mediation process provided for in a relevant Act.

6. The definitions of '*relevant Act'* and '*relevant auth*ority' are contained in TCA, section 192A(1). A '*relevant authority'* includes *inter alia*, employment based Commissions, Tribunals and Courts, including the High Court. The following subsections set out the type of payments that are exempt from tax:

> *(2) Subject to subsections (3) and (5), this section applies to a payment under a relevant Act, to an employee or former employee by his or her employer or former employer, as the case may be, which is made, on or after 4 February 2004, in accordance with a recommendation, decision or a determination by a relevant authority in accordance with the provisions of that Act.*
>
> *(3) A payment made in accordance with a settlement arrived at under a mediation process provided for in a relevant Act shall be treated as if it had been made in accordance with a recommendation, decision or determination under that Act of a relevant authority.*
>
> *(4) (a)Subject to subsection (5) and without prejudice to any of the terms or conditions of an agreement referred to in this subsection, this section shall apply to a payment –*
>
> > *(i) made, on or after 4 February 2004, under an agreement evidenced in writing, being an agreement between persons who are not connected with each other (within the meaning of section 10), in settlement of a claim which –*
> >
> > > *(I) had it been made to a relevant authority, would have been a bona fide claim made under the provisions of a relevant Act,*
> > > *(II) is evidenced in writing, and*
> > > *(III) had the claim not been settled by the agreement, is likely to have been the subject of a recommendation, decision or determination under that Act by a relevant authority that a payment be made to the person making the claim,*
> >
> > *(ii) the amount of which does not exceed the maximum payment which, in accordance with a decision or determination by a relevant authority (other than the Circuit Court or the High Court) under the relevant Act, could have been made under that Act in relation to the claim, had the claim not been settled by agreement, and*
> > *(iii) where –*

(I) *copies of the agreement and the statement of claim are kept and retained by the employer, by or on behalf of whom the payment was made, for a period of six years from the day on which the payment was made, and*

(II) *the employer has made copies of the agreement and the statement of claim available to an officer of the Revenue Commissioners where the officer has requested the employer to make those copies available to him or her."*

7. Finally, as I am required to establish "*the correct liability to tax of appellants"* pursuant to Finance (Tax Appeals) Act 2015, section 6(2)(l), it is also necessary to consider whether any of the Payment comes within the charge to capital gains tax.

8. In this regard, the charge to capital gains tax as set out in TCA, section 28 (1) provides:

"Capital gains tax shall be charged in accordance with the Capital Gains Tax Acts in respect of capital gains, that is, in respect of chargeable gains computed in accordance with those Acts and accruing to a person on the disposal of assets."

9. TCA, section 29(2) provides that the '*Persons Chargeable'*:

"shall be chargeable to capital gains tax in respect of chargeable gains accruing to such person in a year of assessment for which such person is resident or ordinarily resident in the State."

10. The amount chargeable is in accordance with TCA, section 31 in respect of:

"*the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting –*

(a) *any allowable losses accruing to that person in that year of assessment"*

11. TCA, section 532 defines assets as all:

"All forms of property shall be assets for the purposes of the Capital Gains Tax code whether situate in the State or not."

12. TCA, section 535(2) extends the concept of disposal to capital sums derived from assets, even if no asset is acquired by the person paying the capital sum and provides as follows:

(a) *Subject to sections 536 and 537(1) and to any other exceptions in the Capital Gains Tax Acts, there shall be for the purposes of those Acts a disposal of an asset by its owner where any capital sum is derived from the asset notwithstanding that no asset is acquired by the person paying the capital sum, and this paragraph shall apply in particular to –*

(i) *capital sums received by means of compensation for any kind of damage or in jury to an asset or for the loss, destruction or dissipation of an asset or for any depreciation or risk of depreciation of an asset,*
(ii) *capital sums received under a policy of insurance of the risk of any kind of damage or injury to, or the loss or depreciation of, an asset,*
(iii) *capital sums received in return for forfeiture or surrender of a right or for refraining from exercising a right, and*
(iv) *capital sums received as consideration for use or exploitation of an asset.*

Material findings of Fact

13. The Appellant, specialised [redacted].

14. In late [redacted] he was head hunted by the Firm [redacted]. The Firm was placed behind some of the [redacted] which was booming. On the Appellant's appointment, the Firm engaged in a publicity campaign describing the Appellant [redacted].

15. He was active in promoting the Firm and set up many [redacted] and had advised [redacted]. He led the [redacted] and provided training within the Firm to improve technical standards which were not adapted to the challenges of the specialism, even at senior level.

[redacted]From his initial engagement, certain matters within the Firm caused him disquiet. There was a very high staff turnover in the Firm's [redacted] Furthermore he inherited "*some very dangerous precedents*" that clients wanted repeated and the technical ability and professional quality of some of his senior colleagues were, in some cases, poor. The approach to ethics was markedly different to what he had been used [redacted]

[redacted]

17. Having aired some of these concerns, the Firm hired [redacted] The Appellant was of the view that [redacted]'s appointment was a deliberate denigration of him both within the Firm in front of the staff and also publicly.

18. The first [redacted] meeting called by [redacted] was attended by all of the Appellant's colleagues where [redacted] announced that it was common knowledge that the Appellant's [redacted] were "*all over the place with no consistency*" and that [redacted] would set that right. Unbeknown to the Appellant, the meeting was informed that [redacted] had already spoken with key clients [redacted] and that the Firm's services would improve. As such the Appellant considered that his credibility [redacted] was irreparably damaged and that he had been portrayed as "*a legal and commercial liability*". The Firm was openly telling his team that they had been discussing the Appellant with clients.

19. A succession of performance review meetings were arranged with the Appellant. At that meeting he exposed "*the poorly-supported accusations in relation to my technical skills*" to [redacted] and [redacted]. Mr [redacted]'s presence confirmed that the issue of Appellant's performance was now a matter for the Firm.

20. At the next team meeting, without explaining, [redacted] set about allocating fee earners to the files. All of the Appellant's clients with the exception of [redacted] were transferred to [redacted] explained in front of his colleagues that this had been requested by several clients, naming a [redacted] as saying that he did not want to work with the Appellant again. The Appellant subsequently spoke with [redacted] since leaving the Firm and continues to "*work with and for*" [redacted].

21. [redacted] was not copied in on the correspondence but had been reviewing the files and at the next team meeting [redacted] chastised the Appellant for his "*disobedience*". [redacted]

[redacted]

22. At further team meetings, some of the fee earners complained of their excessive workload, however [redacted] did not allocate any new matters to the Appellant despite his insistence that he had run out of work.

23. [redacted] also diverted the Appellant's e-mail to [redacted] without his permission and responded to emails without notifying him. [redacted] However the client contacted him directly and expressed surprise and asked why [redacted] was handling the file and what would his involvement be in the future.

24. The e-mail exchanges with [redacted] criticisms of the Appellant, which should have been stored securely, were instead available to all members of the Firm.

25. Not only did the Appellant perceive that damage was being done to his reputation within the Firm and the client group, his sudden exclusion from all events [redacted] was communicated widely and from then he felt that he was a marginalised figure.

26. The Appellant's name was removed from [redacted] The Appellant considered that as this communication was to the [redacted] there was an inference that he had been demoted or was not a trusted figure within the Firm.

27. The Appellant's main concern was his professional reputation, which was his only asset as at that time he had no independent client base. There were not many [redacted] as the market was small and word of the Appellant's demotion would get round very quickly.

28. Following the Appellant's end of year review in [redacted] in an email [redacted], the Appellant wrote to the Firm to outline his grievances in the manner in which the Firm had treated him. That email concluded "*I feel the reasonable explanations I have given have deliberately not been listened to and no reference is*

[redacted]

made to them in correspondence which gives rise to an overall impression of prejudice. I am suspicious that events and conclusions are being re-characterised and described differently long after the event to further unfounded criticism of my performance. It is intimidating and I and others have picked up on the extraordinary hostility to my input and the team's shared experience. I am therefore asking for the instigation of the grievance procedure."

29. The Firm replied by letter [redacted] inviting the Appellant to "*a formal disciplinary meeting*" to discuss "*whether or not you should be subjected to disciplinary action*". That letter proceeded to explain:

> *"If your explanations are unacceptable,* [redacted] *will consider the appropriate sanction to be applied in line with the disciplinary procedure. In light of the seriousness of the issues in relation to your performance my preliminary view is that your conduct warrants a written warning, i.e. I propose skipping the first level of the disciplinary procedure. However, my view in no way amounts to a predetermination of the matter and it will be a matter for* [redacted] *to consider and decide on the appropriate sanction, if any.*
>
> *…..*
>
> *If* [redacted] *does decide to impose a warning, you will be advised of the reason for the warning, the corrective action necessary, and the time in which to achieve improvement and what the consequences of a failure to improve will be."*

30. In response to that letter, the Appellant engaged a firm of Solicitors, [redacted] wrote to the Firm informing it that the Appellant had "*an actionable claim in defamation and for injury to his reputation"* and required the Firm to provide:

> "*the following undertakings:*
>
> 1) *That you will immediately desist the spurious disciplinary procedure instituted against [the Appellant].*
>
> 2) *That you will not embark on any other unfounded and unjustified disciplinary procedure against [the Appellant].*
>
> 3) *That you will immediately desist all victimisation of [the Appellant].*

4) *Desist from the ongoing campaign to injure or destroy [the Appellant's] professional reputation.*

5) *That [the Appellant's] normal responsibilities and level of work be restored to him.*

6) *That you will immediately restore to him the rights he had until* [redacted] *in respect of agreeing and signing opinions and correspondence with clients.*

7) *That you will immediately take all necessary steps to repair the unjustified damage already inflicted on [the Appellant's] professional reputation.*

8) *That the firm will properly, fairly and expediently investigate his grievance."*

31. That letter concluded:

"[The Appellant's] course of action will be determined by your response. This is a matter of the utmost urgency and we await your response by close of business tomorrow."

32. Having engaged Counsel, [redacted] SC, the Appellant's focus was on his professional reputation. It was not until the draft Compromise Agreement was put to him that the issue of the mechanism for leaving the firm and the calculation of compensation for the salary in lieu of notice and unspent holidays was considered. The Appellant's starting position for negotiation for compensation was over €400,000, while the Firm's figure was €15,000. As there was a significant divergence in the negotiating positions between the parties, settlement talks broke down until the Appellant received a communication from the Firm the following week attempting to procure an agreement.

33. Following negotiations, a Compromise Agreement was finalised and thereafter signed by the Firm and the Appellant [redacted]. The relevant parts of the Agreement provide as follows:

1.2 A number of disputes have arisen between the Employer and the Employee and the Employee has alleged, inter alia, that he has been defamed, victimised and that the Employer proposes to subject him to an unlawful disciplinary process. The Employer denies those claims in their entirety;

1.3 The Parties have agreed to settle all disputes between them on the following terms;

2 RESIGNATION

2.1 The Employee will resign from his employment with the Employer with effect from [redacted] ('the Termination Date')

3 CONSIDERATION, RELEASE AND DISCHARGE

3.1 The Employer agrees to pay and the Employee agrees to accept the sum of €180,000 gross in full and final settlement of all or any claims or entitlements (including the Employee's claims that he has been defamed and victimised) that the Employee may have howsoever arising out of or in connection with his employment with the Employer or the termination thereof against the Employer its partners, employees, servants or agents, whether at common law, in equity or under statute….

3.2 The Employer will pay the sum at 3.1 above in the most tax efficient manner permissible by law. The sum at 3.1 above is a gross sum, i.e. the Employer will deduct from the sum of €180,000 any necessary deductions in respect of income tax, PRSI and universal social charge before making any payment to the Employee. The Employer's liability to the Employee under this Agreement will in any event not exceed €180,000.

….

3.7 The payment at 3.1 above is made strictly without admission of liability on the part of the Employer.

4 INDEPENDENT LEGAL ADVICE

4.1 The Employee acknowledges that he has taken independent legal advice prior to signing this Agreement and that he understands the full meaning and effect of entering into this Agreement.

WITHDRAWAL OF ALLEGATIONS

5 The Employee withdraws and agrees not to repeat each of the allegations made by him against the Employer. The Employer withdraws and agrees not to repeat the allegations made by it against the Employee."

34. At the time of the settlement talks, the Appellant had received an unconditional offer from [redacted] to join as partner which he did not disclose to the Firm.

35. The negotiations that led to the Compromise Agreement were long, with the Firm refusing to engage in the question of apportionment between salary and damages. Therefore the Appellant and his legal team were primarily concerned with procuring a signed agreement and thereafter to correspond with the Firm on apportionment, if necessary.

36. The Appellant engaged a [redacted], FCCA, AITI, to assist him with the tax treatment of the Payment. [redacted], reviewed the Appellant's contract of employment and holiday entitlement and thereafter made a post settlement submission to the Respondent in which she calculated that the Appellant's salary entitlement was €55,000 or 4 months' salary made up as follows:

- Pay in lieu of Notice - 3 months' salary.
- Payment for days worked or to be worked - 8 days in the period 1[redacted] and an additional 5 days working at the request of the Firm.
- Holiday pay from [redacted] working out at 7 days.

37. Furthermore, [redacted] saw *"no other legal obligations on [the Firm] to make any further payments under the terms of the Contract of Service to [the Appellant]. ….. Consequently, salary for four months is due and payable to [the Appellant] under the terms of his Contract of Employment was 3 months pay in lieu and one month pay for work done, to be done and/or holiday pay. Given that [the Appellant's] employment with [the Firm] ended in difficult circumstances, we believe it is fair to conclude that no payment over and above that legally required under the terms of his Contract of Employment would be made.*"

38. The Respondent replied [redacted] and relied on the assumption that TCA, section 123 applied, and that all of the payments under the Compromise Agreement were made "… *in connection with or otherwise as a consequence of the termination of*

the employee's employment …" As such the full settlement payment was subject to tax pursuant to TCA, section 123. Furthermore TCA, section 192A did not apply, as "*this is a global payment in settlement of all issues*." The Respondent's decision also stated that TCA, section 613 did not apply to any part of the payment.

39. Following that decision, between August and October [redacted], Counsel for the Appellant sent several letters to Counsel for the Firm to see if an apportionment between salary, damage for victimisation and defamation could be agreed for presentation to the Respondent. However none of the Appellant's correspondence was answered.

40. Solicitors acting for the Firm wrote to the solicitor acting for the Appellant on [redacted] stating that it was aware of the Respondent's decision and it would be making payment by [redacted] on the basis that all of the amounts payable under the Compromise Agreement were chargeable to tax and that the best course of action was to treat the entire sum as being subject to tax and for the Appellant to pursue a refund.

41. Counsel for the Appellant again wrote to counsel for the Firm to agree an apportionment of the settlement. However in the absence of engagement, the Firm paid the settlement sum, net of tax, PAYE and PRSI, into the Appellant's bank account.

42. In an Opinion dated [redacted], [redacted], SC was of the view that:

> *"It was a matter in which we were purporting to institute proceedings against* [the Firm]*, but the necessity of instituting proceedings was obviated by the execution of a settlement agreement dated* [redacted] [sic].
>
> …
>
> *My instructing solicitor* [redacted] *and I took detailed instructions from [the Appellant]. It was clear that there was substantial evidence to ground a claim in defamation and to establish injury to* [the Appellant's] *professional reputation.*
>
> …
>
> *A significant part of the claim that was compromised in this agreement was a claim for defamation and for injury to* [the Appellant's] *reputation.*
>
> …

In relation to how the sum of €180,000 is to be apportioned, it is my opinion now that a sum of €80,000 could fairly be apportioned to the settlement of his claim in respect of defamation and injury to his reputation, and that the balance of €100,000 represented a payment in the nature of a severance payment, or otherwise represented remuneration that would be liable to income tax subject to allowances in the ordinary way.

I should also state that I formed this opinion, and had this apportionment in mind at the time of negotiating the settlement, and discussed this with counsel for [the Firm]. *It will be noted that the settlement agreement makes express reference to defamation.*

[The Appellant] *had an accrued cause of action which, if successful, would have entitled him to an award of general damages. A payment made in settlement of that cause of action is wholly distinct from any payment in the nature of a severance payment, and the fact that the compromise agreement of* [redacted] [sic] *provided for the payment by* [the Firm] *of a total amount of €180,000 does not change that. It is what gives rise to the present opinion. It is my opinion that* [the Appellant's] *claim for defamation or injury to his reputation had, conservatively, a value of €80,000. This arose in time prior to, and is wholly distinct from any cause of action or payment subsequently arising in connection with the termination of his employment. That sum cannot be characterised as a payment made in "in connection with" the termination of* [the Appellant's] *employment for the purposes of Section 123 of the TCA 1997 or otherwise."*

Appellant's Submissions

43. Over the course of [redacted], the Appellant made claims against the Firm in respect of victimisation, defamation and a disciplinary process instigated against him as a tactical consequence of making those claims. The Appellant signed a Compromise Agreement dated [redacted] pursuant to which the Firm would pay €180,000, without any admission of liability on its part to include "*the Employee's claims that he has been defamed and victimised*". The Firm was to make such payment "*in the most tax efficient manner permissible by law … the Employer will deduct from the sum of €180,000 any necessary deductions in respect of income tax, PRSI and universal social charge before making payment to the Employee.*" Although the Compromise Agreement was premised on the settlement of several claims in the one agreement, it contained no express apportionment of amounts between the claims for damages for termination of employment, damages for victimisation and damages for defamation.

44. The damage done to the Appellant's professional reputation and the use of a disciplinary procedure as a reaction by the Firm to discourage the Appellant from pressing his claims for damage to reputation and victimisation dominated all of the correspondence with the Firm. There was at that time no cause for any claim in connection with a termination of employment which, though feared by the Appellant, had not arisen. During the latter stages of the negotiation of the Compromise Agreement in [redacted], as the Appellant had mixed feelings about continuing to be employed by the Firm and as an incentive to settle, it was conceded by the Firm that the Appellant could leave work without having to serve his contractual notice period, and a severance payment was offered as part of that discussion.

45. It was asserted by the Respondent that all of the payments were made:

    (a) "*in connection wit*h" the termination of employment in the way such term has been used by the Respondent; or
    (b) "*in consideration or consequence of*" the termination of employment,
    (c) TCA, section 613 was not applicable and was not supported by the Respondent and was independent of first decision that TCA, section 123 applied to all of the Payment,
    (d) The decision that TCA, section 192A did not apply was not adequately explained.

46. It was clear from the Respondent's decisions on TCA, sections 123 and 613 that none of the Payment was for damage or injury to the Appellant in his profession. It was submitted that:

(a) in absence of evidence to support such a negative inference on the character of the Payment;
(b) against the weight of evidence to the contrary; and
(c) having regard for the events in connection with which the Payment,

the Respondent's decision was an inadmissible and capricious assumption.

47. The Payment for victimisation and defamation was in consideration or consequence of claims in respect of the injury suffered by the Appellant in his person and his profession, and are not '*connected with*' or arising '*in consequence of*' the termination of employment, and so TCA, section 123 does not apply to the Payment. The claims for victimisation and defamation predated any claim for termination of employment and could have been pursued by the Appellant even if there had been no termination of employment and would not have been chargeable to tax owing to the application of TCA, sections 201(2)(a) and/or TCA, section 613 and TCA, section 192A in respect of the claim for victimisation.

48. The Respondent's Notes for Guidance in respect of the TCA, Finance Act 2015 Edition states that "… *in interpreting S123 of the TCA 1997, the payments charged to tax under that Section are to be described by reference to the events in connection with which the payments are made* ...".

49. The Notes for Guidance reflect the principle that the tax treatment of any payment depends on the nature and character of the payments being made and the real nature of the agreement between the parties. A certain part of the Payment received under the Compromise Agreement fairly related to income and that part is fully subject to tax, however the balance:

    (a) to the extent that it is categorised as income, being exempt under TCA, section 201(2)(a) or TCA, section 192A; or
    (b) to the extent a capital gain, exempt from taxation under TCA, section 613.

50. There was evidence supporting the view that some of the Payment related to compensation and damages for victimisation and injury to the person in his profession, and did not relate to income, and the apportionment of that amount.

51. Assuming, which was not conceded that TCA, section 123 rather than TCA, section 613 applied, where damages are paid in respect of several but distinct claims, it was not a fair interpretation of the section to read it as meaning that the making of a single

payment to settle all such claims was in itself sufficient to connect all of them with the termination of employment.

52. The more obvious interpretation of TCA, section 123 was that it is a catch-all clause to tax emoluments, bonuses, severance and gratuity-type payments, however disguised, being made to departing employees. However it cannot be right to interpret the section so widely as to mean that legislature intends to tax damages for victimisation and injury simply because payment for such damages occurred at the same time as payments in respect of the termination of employment.

53. Damages for injury to the person, which includes damages or compensation for defamation and injury suffered in the taxpayer's person or his profession are classified as capital gains. TCA, section 613 is drafted to provide an exemption for *" … any sum obtained by means of compensation or damages for any wrong or injury suffered by an individual … in his or her profession."* As such TCA, section 123 should not be used to circumvent TCA, section 613 which has been drafted with specific reference to damages for injury to the person, such as those that are payable to the Appellant under the Compromise Agreement.

54. Further to the above, to cover off the possibility of a characterisation of such payments as income, TCA, section 201(2)(a) applies as a specific exemption to TCA, section 123 where:

> *" Income tax shall not be charged by virtue of section 123 in respect of the following payments:*
>
> *(a) any payment made in connection with the termination of the holding of an office or employment by the death of the holder, or made on account of injury to or disability of the holder of an office or employment;" [emphasis added].*

55. The Compromise Agreement was silent on the apportionment of the Payment to the claims for victimisation, defamation and termination of employment. Importantly the Firm made the Payment without admission of liability and would not during the negotiation of the Compromise Agreement agree to set out an amount for each of the claims. It also avoided answering the Appellant's correspondence attempting to engage on the matter between the signing of the Compromise Agreement and the Firm's payment [redacted], which the Appellant had attempted to resist.

56. [redacted], Senior Counsel, acted for the Appellant in the negotiation of the Compromise Agreement and had set the apportionment of the settlement amount of €180,000 as follows:

    (a) €80,000 damages for victimisation and defamation, and
    (b) €100,000 severance payment. These figures were said by him to be 'conservative' as regards the amount payable for damages.

57. The Respondent wrongly assumed that all of the Payment received by the Appellant under the Compromise Agreement related to income and, in reliance on that impermissible assumption, wrongly applied TCA, section 123 to all of the Payment.

58. In light of the events and the real nature of the Compromise Agreement, the Respondent was wrong to categorise or describe the Payments in respect of claims for victimisation and defamation as a Payment made in connection with or otherwise as a consequence of the termination of the Appellant's employment.

59. Furthermore, the Respondent did not either apply the TCA, section 201(2)(a) exemption to TCA, section 123 , or apply TCA, section 613 to any of the Payment in respect of claims for victimisation and defamation. TCA, section 123 was applied in circumvention of TCA, sections 201(2)(a) and 613 and that the Respondent did not apportion any of the Payment under the Compromise Agreement to damages.

60. If the assumption made by the Respondent that none of the Payment contained in the global payment related to damages or compensation for victimisation or injury to the Appellant in his person or profession was impermissible or capricious, then the decision made by the Respondent on the application of TCA, section 123 was wrong.

61. There was consensus that payments for compensation and damages for personal injury and defamation (i.e. injury to a person in his profession) are to be treated as capital payments. This being so, TCA, section 123 is not relevant to them because they are not income. They are to be taxed as, and are subject to, the exclusions provided in respect of capital gains.

62. In support of the tax characterisation of the damage/compensatory part of the award as a capital gain for tax purposes, reference is made to Capital Gains Tax Act, 1975 Section 24(1) which stated:

    "The following shall not be chargeable gains –

…

(c) sums obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession."

63. The Law Reform Commission's Report on Personal Injuries: Periodic Payments and Structures Settlements 1996 stated at paragraph 2.41:

"For tax purposes compensation awards in personal injuries cases are treated as capital, rather than income receipts … [exclusion for losses of earnings which are taxable] … Consequently the actual lump sum award itself is not taxed in the hands of the recipient."

64. TCA, section 613(1) provides:

"the following shall not be chargeable gains-

…

(c) any sum obtained by means of compensation or damages for any wrong or injury suffered by an individual in his or her person or in his or her profession"

65. It also relevant that in Irish Tax Review 2008 May, page 4 states:

"In general, an award of damages for a wrong/tort suffered is not taxable – for example, damages for personal or psychological injuries suffered through stress or bullying should not be taxable."

66. The fact that some of the Award is caught by TCA, section 123 as income, and the remainder is to be treated as exempt under the provisions relating to capital gains, means that the allocation exercise sought by the Appellant and argued in its submissions is the only legal course open to the Respondent as it has no statutory or other right to tax all of the award to income tax.

67. The above is supported by the Respondent's own exhibits , and reference was made to page 6 of The Irish Tax Review 2008 in this respect as a correct summation of the proper treatment of the Award:

"Apportionment Issue

> *The question of apportionment is relevant only where the global figure includes elements with potentially differing tax treatments. Without any statutory basis of apportionment, the tax apportionment adopted by the taxpayer should be in accord with the relevant proceedings, the settlement agreement and the facts of the case."*

68. The Compromise Agreement contained the terms on which the Appellant agreed to drop his claims against the Firm in return for the payment of a settlement amount. It contained wording that seeks to distance the Firm from any future claims relating to the same facts and heads of action. One of the mechanisms by which this is achieved is by the Appellant's agreement that he had no claims against the Firm. However this does not mean that the Appellant never had any claims against the Firm, rather than in consideration of the payment by Firm, the Appellant agreed that he had no claim against the Firm. The payment was not a gift, it was the payment for dropping of the claims detailed therein.

69. It is submitted, as a matter of construction, that the use of terms such as "*inter alia that he has been defamed, victimised and … subject[ed] … to an unlawful disciplinary process*" and "*including … that he has been defamed or victimised*" are indicative that in the mind of the lawyers acting for the Firm, these are the principal claims in respect of which the Compromise Agreement was entered into.

70. Clauses 3.5 and 3.6 of the Compromise Agreement set out the mechanism for calculation of the Appellant's entitlements as employee, the working days between 1 April and 10 April 2015, with a further five days at the request of the Firm. This comes to thirteen working days. It is assumed by [redacted] for the purposes of her calculation of the contractual entitlement that further payment was made for the contractual notice period of three months, with a further accrual of seven days for paid holidays. However outside of this, there is no evidence of any of the payment relating to income.

71. In conclusion, it was submitted:

    (i) there was sufficient evidence of part of the global payment under the Compromise Agreement relating to compensation or damages for any wrong or injury suffered by the Appellant in his person or his profession;

(ii) these amounts do not relate to the termination of employment or arise as a consequence of the termination of employment, or have a different genesis and attract different tax treatment;

(iii) the amounts were in principle not intended by legislature to be caught by TCA, section 123;

(iv) however if caught by TCA, section 123, that the exemption under TCA, section 201(2)(a) applies;

(v) if the Payment was not caught by TCA, section 123, it did not fall to be assessed as income, but as a capital gain and that TCA, section 613 applies;

(vi) determine that of the Payment of an amount of €180,000 minus an amount that represents income of between €55,000 and €100,000, at the discretion of the Commissioner, having regard to the events and evidence presented to him, is to be properly characterised as payment for damages or compensation, and

(vii) determine that a payment for victimisation made under an out-of-court settlement agreement is exempt from charges to income tax, PRSI and universal social charge under TCA, section 192A.

Respondent's Submissions

72. As a matter of law, the burden of proof at a tax appeal is on a taxpayer. This is on the basis that only the taxpayer has access to the full facts relating to his/her personal tax position. In *Menolly Homes Ltd. v Appeal Commissioners & Revenue Commissioners* [2010] IECHC 49, Charleton J. stated the position thus at para.20, para.22 and para.23:

"This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland"

"The burden of proof in this appeal process, as in all taxation appeals, on the taxpayer."

73. It is submitted that, in the present case, the burden of proof falls on the Appellant to show that he is entitled to the exemption(s) claimed.

74. This appeal concerns a claim for exemption (or partial exemption) from tax on a payment made to the Appellant by his employer.

75. The principles of statutory interpretation as they apply to tax legislation have been considered in a number of cases and most recently in by the Supreme Court in *Bookfinders Ltd. v The Revenue Commissioners* [2020] IESC 60.

76. The main principle or canon of construction for statutes is that the words of the statute are to be given their literal meaning. This approach was described by Henchy J. in *Inspector of Taxes v Kiernan* [1981] IR 117 at p.121 in the following terms:

> *"A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole…"*

77. In considering statutes creating a penal or taxation liability Henchy J. stated that:

> *"…if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language*.."

78. However, when it comes to exemptions and reliefs the reverse holds true and it is for the taxpayer to show that an exemption from tax applies. Therefore, notwithstanding that taxation statutes are to be construed strictly, the approaches to the construction of charging provisions and relieving provisions can differ in some respects. This approach was summarised by Kennedy CJ in *Revenue Commissioners v Doorley* [1933] IR 750 as follows:

> *"I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from the tax must be given expressly and in clear and unambiguous terms within the letter of the statute as interpreted with the assistance of the ordinary canons for the construction of statutes. The court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed on that description of subject matter. As the imposition of, so the exemption from, the tax must be brought*

within the letter of the taxing act as interpreted by the established canons of construction so far as possible".

79. Once a taxpayer has been brought within the charge to tax, the onus lies on him/her to prove that some relieving section applies. In *O'Connell v Fyffes Banana Processing* [2000] IESC 37 Supreme Court, 24 July 2000 the Supreme Court followed the principles in *Doorley* and confirmed that an exemption from tax must be given expressly and in clear and unambiguous terms. In considering the application of the principle of the strict construction of taxing statutes Keane CJ stated at page 8:

"It is not, of course, in dispute in the present case that the respondent is subject to corporation tax: the question is as to whether it is also entitled to the relief afforded by s.41(2) of the Finance Act 1980 [manufacturing relief]. We are here, accordingly not concerned with a question as to whether a tax was imposed in the first place but rather with whether the respondent is entitled to a measure of relief in respect of the tax so imposed. As pointed out by the learned Chief Justice [in Revenue Commissioners v Doorley] relief of that nature must be given in clear and unambiguous terms."

80. The dictum in *Doorley* has been cited and approved repeatedly by the Superior Courts and most recently by the Supreme Court in *Bookfinders Ltd. v The Revenue Commissioners .*

81. In the present case the onus of proof lies with the Appellant to show that he is clearly and unambiguously entitled to an exemption (or partial exemption) from tax in relation to the payment made to him by his employer.

82. The Respondent's submissions may be summarised as follows:

(a) The Payment received by the Appellant from his former employer on foot of the Compromise Agreement constituted a payment '*made ….. either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment'* in accordance with TCA, section 123(1).

(b) The payment, or any part thereof, is not exempt from tax under the provisions of TCA, section 201(2)(a)(i)(II).

(c) The payment, or any part thereof, does not meet the statutory requirements of TCA, section 192A and was not exempt from income tax in accordance with that provision.

(d) The provisions of TCA, section 613 were not relevant to the within appeal or, alternatively, (and without prejudice) the payment, or any part thereof, was not exempt from tax pursuant to the said section.

(e) There was no statutory basis for apportionment of the payment made to the Appellant.

83. When a lump sum payment is made to an employee on termination of employment the first question to be considered is whether or not the payment is to be treated as a perquisite or other profit of the office or employment so as to be taxable under the main charging rule of Schedule E in TCA which is section 112. If the payment is not directly chargeable to income tax under TCA, section 112, it remains necessary to consider whether, and if so to what extent, it may be charged to income tax under TCA, section 123 which deals specifically with payments in connection with the termination of an office or employment not already chargeable to tax under Schedule E.

84. The Respondent was satisfied that, given the nature of the payment in this case, it was not chargeable to tax under TCA, section 112 but correctly chargeable to tax under section 123 TCA 1997.

85. TCA, section 123(1) provides as follows:

> *'This section shall apply to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments,'*

86. TCA, section 123 is therefore a residual charging section in relation to certain payments made on retirement or removal from office or employment which are "*not otherwise chargeable to income tax*".

87. The Compromise Agreement was in settlement of all disputes between the parties. At the outset it is important to note that the Appellant never issued any legal proceedings against his employer.

88. The Appellant made reference to what is described as a "*letter of claim*" [redacted] sent by [redacted] to the Appellant's employer. While the Appellant labelled this letter as a "letter of claim", in reality this letter set out a chronology of events which had occurred towards the end of his employment and set out the Appellant's viewpoint in relation to those events. The letter concluded by stating that the Appellant's course of action would be determined by the employer's response. In the circumstances it was submitted that this letter did not constitute a 'claim' of any nature and that, at that point in [redacted], the Appellant was still considering his options.

89. The said letter contained no reference to 'victimisation'. The letter concluded by stating that the Appellant "*already has an actionable claim in defamation and for injury to his reputation*". This is also reflected in the Opinion of [redacted] SC [redacted] wherein he concluded that, in his opinion, the Appellant's claim for defamation or injury to his reputation had, conservatively, a value of €80,000. In the circumstances, it was submitted that any purported 'claim' by the Appellant might have had against his employer related to a claim in defamation and for injury to his reputation.

90. When considering the nature of the payment made to the Appellant one must consider the terms of the Compromise Agreement on foot of which the payment was made.

91. Recital 1.2 of the Agreement indicated that the employee had made various allegations but, importantly, the employer denied those claims in their entirety.

92. The Compromise Agreement provided for the payment of a sum of €180,000 to the Appellant '*in full and final settlement of all or any claims or entitlements'* arising *'in connection with his employment with the Employer or the termination thereof against the Employer ….. whether at common law, in equity or under statute*.' In circumstances where the Appellant agreed in accordance with clause 2 to resign from his employment ceased with effect from 'the Termination date' being [redacted].

93. The sum of €180,000 was agreed and accepted by the Appellant in circumstances where the payment was made '*strictly without admission of liability on the part of the Employer*' per clause 3.7 and in circumstances where the Appellant, as employee, agreed to withdraw each of the allegations made against his employer and where his employer agreed to withdraw allegations made against the Appellant (clause 5). The Appellant, pursuant to the Compromise Agreement, agreed to resign from his employment with effect from [redacted] (Clause 2.1).

94. The Appellant was legally represented at the time he executed the Compromise Agreement and had acknowledged pursuant to clause 4.1 that he took independent legal advice prior to signing the Compromise Agreement and that he understood the full meaning and effect of entering into the Compromise Agreement.

95. The Compromise Agreement reflected a gross sum in full and final settlement of all disputes between the parties without any admission of liability. Importantly, the agreement did not reflect any breakdown of the payment into separate constituent parts to reflect a sum paid for the termination of the employment and a sum paid for damages.

96. Thus, pursuant to the express terms of the Compromise Agreement, the payment was not made in relation to a series of allegations nor did it seek to apportion the payment between any different heads of claim.

97. Based on the clear and express terms of the Compromise Agreement, neither the payment, nor any part thereof, comprised of, or could be categorised as, damages for defamation or injury to reputation as alleged by the Appellant. In the circumstances, it was submitted that the payment was fully taxable under TCA, section 123 and it was not possible nor necessary to identify a basis for apportionment of the payment as contended by the Appellant.

98. TCA, section 123 TCA 1997 is very widely drafted and that to come within the ambit of this charging section the payment may be either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments. In the circumstances the ambit of the section is very wide and the words used should be given a broad rather than a narrow meaning.

99. In circumstances where the Compromise Agreement provided for the termination of the Appellant's employment (by agreement of the Appellant) and where the Appellant agreed to withdraw his allegations and to accept the payment without admission of liability on the part of his employer, it was submitted that the correct legal characterisation of the payment was that the payment was made either directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of the Appellant's employment.

100. It was submitted that based on the clear terms of the Compromise Agreement itself the payment did not represent damages for defamation or injuries suffered by the

Appellant but rather related to a payment in connection with the termination of his employment. The Payment was made by the Appellant's employer so that the Appellant's contract of employment could be terminated. This is further evidenced by the fact that the employer allowed the Appellant to cease his employment without having to serve out his contractual notice.

101. The Appellant made the point that if he had remained in employment he could have issued proceedings for defamation and/or injury to his reputation. However, that is not what actually occurred. It was submitted that this appeal must be considered solely in the context of the factual matrix of what actually occurred i.e. the Appellant's employment was terminated (with his agreement) and he received a lump sum payment from his employer on foot of that termination.

Section 201(2)(a) TCA 1997

102. The Appellant submitted that, if the payment came within section 123, then it was exempt pursuant to section 201(2)(a) which provides as follows:

> *"Income tax shall not be charged by virtue of section 123 in respect of the following payments:*
>
> *(i) an amount not exceeding €200,000 of any payment made –*
>
> *(I) in connection with the termination of the holding of an office or employment by the death of the holder, or*
>
> *(II) on account of injury to or disability of the holder of an office or employment;*

103. The Respondent's principal submission is that no part of the Payment of €180,000 represented damages for defamation or injury to reputation, therefore, section 201(2)(a)(i)(II) was of no relevance whatsoever.

104. Without prejudice to the foregoing, it was submitted that the meaning of payments on account of injury or disability in section 201(2)(a)(i)(II) cannot possibly be intended to apply to a payment of damages for defamation or injury to reputation. It was submitted that in the context of the exemptions provided for in TCA, section 201(2)(a)(i) namely death, injury or disability, the meaning of 'injury' and 'disability' relates to medical conditions which prevent a person from carrying out his/her employment.

105. In addition, the exception relates to payments made on account of an injury or disability which led to the termination of the employment. In the present case the Appellant's submission is that he could have remained on in employment and brought an action against his employer for defamation and injury to reputation. Therefore, there is no basis for stating that the payment was made on account of an injury or disability which led to the termination of his employment

106. In the present case, the Payment was clearly made by the Appellant's employer for the purposes of bringing the Appellant's employment to an end and was not made on account of any injury or disability suffered by the Appellant. In relation to the second part of the test, the Appellant was clearly not suffering from any medical condition which prevented him from carrying out his employment.

TCA, section 192A

107. TCA, section 192A(5) provides that the section shall not apply to '*so much of a payment under a relevant Act or an agreement referred to in subsection (4) as is …. (b) a payment referred to in section 123(1)*'. Therefore where the payment fell squarely within TCA, section 123, TCA, section 192A had no application.

108. Notwithstanding the above, TCA, section 192A provides for an exemption from income tax for payments made to an employee or former employee by his or her employer or former employer where the payment is made under a 'relevant Act' in accordance with a recommendation, decision or determination under that Act of a 'relevant authority', as defined. A 'relevant Act' is defined as meaning "*an enactment which contains provisions for the protection of employees' rights and entitlements or for the obligations of employers towards their employees*".

109. It was submitted that a claim for damages for defamation or injury to reputation cannot be categorised as a claim which would fall within the definition of a '*relevant Act*' as set out in TCA, section 192A and, in the circumstances that section had no relevance. Claims in respect of defamation or injury to reputation do not come within the scope of any employment legislation but rather such claims are pursued by way of ordinary civil proceedings in the Courts.

110. TCA, section 192A(4) provides for an exemption from tax in respect of a payment made under a written agreement in circumstances where, had the claim not been settled by agreement, it was likely to have been the subject of a recommendation, decision or determination by a relevant authority. This exemption covers what are normally referred to as "*out of court settlements*"

111. While the High Court is a '*relevant authority'* for the purposes of TCA, section 192A this is clearly in reference to its appellate jurisdiction or originating proceedings in relation to employment related matters. It was submitted that the inclusion of the High Court as a 'relevant authority' arises solely in the context of a claim or an appeal to the High Court pursuant to a *relevant Act* i.e. an Act which provides for protection of employment rights.

112. TCA, section 192A(4)(a)(iii) also refers to the retention of the '*statement of claim'*. In this regard while there was a written agreement in the present case no statement of claim ever issued as, per the submissions of the Appellant, the necessity of instituting proceedings, either with the Workplace Relations Commission or the High Court was obviated by the execution of the Compromise Agreement. In order to come within subsection (4) the matter in dispute must have been advanced to a point where there is a real prospect that the matter will be the subject of determination by the Courts or a Workplace Relations Commission adjudication.

113. TCA, section 192A was considered in detail in TAC Determination 12 TACD 2020. In that case an agreement, described as a "Severance Agreement" was executed by the Appellant and the employer which provided that the employer would make a payment of €65,000 to the appellant and a sum of €10,000 to a firm of solicitors as a contribution towards costs. The Appellant submitted that the payment under the Severance Agreement was a payment of compensation arising from a complaint of bullying made by the appellant. A mediation process was entered into on foot of formal complaints of bullying and during the course of the mediation the appellant said he saw no future with his employer.

114. Revenue's position was that the payment did not come within TCA, section 192A(3) as it was not made under a mediation process provided for in a relevant Act and was not an out of court settlement pursuant to TCA, section192A(4) as the matter must be advanced to a point where there is a real prospect it will go before a court. The Appeal Commissioner focused on the wording and terms of the agreement concluding that: "*the agreement conveys the matters agreed upon by the parties and due regard should be given to the words chosen by the parties"*. The agreement expressed in clear terms that the Appellant was being given notice of termination of employment and there was no reference to the payment being made as a result of a complaint of bullying. The Appellant agreed to accept the payment without any admission of liability of the employer. The mediation process undertaken was not provided for in a relevant Act and the Appellant had made no claim to a relevant authority. The Appeal Commissioner concluded as follows at paragraph 28:

"In any event, section 192A(5) provides that the section shall not apply to a payment referred to in section 123(1). Section 123(1) provides that income tax shall be charged under Schedule E in respect of any payment which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment. I find the payment was made under the Severance Agreement on the termination of the employment of the Appellant."

115. As noted above, the letter dated [redacted] did not constitute a 'claim' of any nature and at that point the Appellant was clearly still considering his options. No proceedings were issued by the Appellant, no claim was made to a relevant authority pursuant to TCA, section 192A, and no statement of claim was lodged. In the circumstances it was submitted that TCA, section 192A can have no application in this appeal.

TCA, section 613

116. The Appellant alternatively relied on the exemption from capital gains tax contained in TCA, section 613(1)(c). That section is included at Part 19 (Principal Provisions relating to Taxation of Chargeable Gains); Chapter 7 (Other reliefs and exemptions) and provides that the following shall not shall be a chargeable gain:

"any sum obtained by means of compensation or damages in respect of any wrong or injury suffered by an individual in his or her person or in his or her profession"

117. The Appellant in this case was not assessed to capital gains tax. In the circumstances it was submitted that TCA, section 613(1)(c) is of no relevance to the question under consideration in this appeal which was whether or not the payment falls within TCA, section 123.

118. Without prejudice to the foregoing principal submission, it is submitted that TCA, section 613(1)(c) does not apply for the following reasons:

(a) TCA, section 123 is a deeming section which deems any payments which fall within the statutory language to be employment income charged to tax under its provisions. It does not matter whether or not the payment is of a capital nature, because the section operates by transforming it into deemed taxable income. Part of the purpose of TCA, section 123 is to avoid the need for

enquiries of that nature (i.e. capital or income) by the simple expedient of deeming any payments which fall within the statutory language to be employment income charged to tax under its provisions.

(b) The payment made by the Appellant's employer was not in the nature of 'compensation' or 'damages'. The references to 'compensation' and 'damages' in TCA, section 613 are clearly made in the context of compensation or damages of the sort that might be payable following the institution of civil proceedings in respect of a defamation or personal injuries claim. This is further evidenced by the references to any wrong or injury suffered by an individual in his or her person. No proceedings were issued by the Appellant in the present case therefore the payment made by the Appellant's employer cannot be regarded as 'compensation' or 'damages' for the purposes of TCA, section 613.

119. In addition, it was submitted that the reference to "in his or her profession" clearly does not include any wrong or injury suffered by an individual in his or her employment. In this regard, TCA, section 18(2) provides that tax in respect of any profession (which by virtue of the definition of 'profession' in TCA, section 2(1) also includes a 'vocation') not contained in any other Schedule is chargeable under Case II of Schedule D i.e. self-employed individuals. Employees are chargeable to tax under Schedule E.

120. Needless to say, the distinguishing factor in this case was that the payment was made by the Appellant's employer on the termination of his employment. Absent that relationship there could be no question of liability pursuant to TCA, section 123.

121. The Appellant makes reference to page 6 of The Irish Tax Review 2008 which contains the following extract:

"Apportionment Issue

The question of apportionment is relevant only where the global figure includes elements with potentially differing tax treatments. Without any statutory basis of apportionment, the tax apportionment adopted by the taxpayer should be in accord with the relevant proceedings, the settlement agreement and the facts of the case."

122. In this regard, it was submitted that the views expressed in journals clearly have no legal standing and, in any event, it must again be emphasised that the Appellant in this case did not, in fact, institute any legal proceedings. If proceedings had issued and the

Appellant had been successful in a claim in defamation, the matter of damages would have been decided by a jury. In the circumstances it is impossible to estimate what quantum of damages that might hypothetically have been awarded.

123. The Appellant submitted various differing figures in respect of the portion of the payment of €180,000 that he considers should be exempt from tax. This only served to make clear that the payment made was a global sum arising on the termination of his employment and undermines his case for apportionment.

124. In the Appellant's notice of appeal dated [redacted] he quantified the damages for defamation and injury to reputation at €80,000. This figure appears to be based upon the Opinion of [redacted] SC. It is notable that the Opinion of [redacted] was obtained in [redacted] and is therefore not contemporaneous with the termination of the Appellant's employment back in [redacted].

125. The Appellant's tax advisor in correspondence with the Respondent dated [redacted] quantified the damages (for defamation and injury to reputation) to be in the region of €125,000.

126. At the original hearing of this matter in October 2018 (the Determination arising from which has since been quashed) the Appellant stated that the sum representing damages was approximately €150,000.

127. In his latest submission, the Appellant specifies the figure for assessable income at somewhere between €55,000 and €100,000.

128. It was submitted that, in circumstances where there are no statutory provisions allowing for apportionment of payments made which are taxable pursuant to TCA section 123, the Appeal Commissioners do not have jurisdiction to arbitrarily determine that any part of the €180,000 paid to the Appellant by his employer on the termination of his employment should not be subject to tax.

129. Having regard to all of the forgoing, it was submitted that the Appellant's appeal herein should be dismissed.

Analysis

130. The issue in this appeal is to determine the relevant tax provisions to be applied to the Payment of the €180,000 received by the Appellant under a Compromise Agreement with the Firm, his former employer.

131. The Appellant asserted that none of the Payment was chargeable to tax under TCA, section 123, however if I agreed with the Respondent that such a charge applied, the Appellant sought exemption from tax in accordance with TCA, section 201(2)(a)(i)(II) as a payment received "*on account of injury to or disability of the holder of an office or employment*".

132. The Appellant also argued that a small but unquantified amount of the Payment was made in accordance with TCA, section 192A as the payment was made under relevant employment legislation providing for the protection of employees.

133. However the Appellant's main submission was on the grounds that a substantial element of the Payment was in respect of "*compensation or damages for any wrong or injury suffered by an individual in his or her person or in his or her profession*" as governed by TCA, section 613(1)(c).

Termination of the holding of an employment – TCA, section 123

134. Before determining the exemption from income tax in TCA, section 201, it is necessary to consider TCA, section 123(1) which imposes a charge to tax under Schedule E in respect of, *inter alia*, compensation payments for loss of office where those payments would otherwise escape tax under the general charging provision of TCA, section 112(1). TCA, section 123(1) provides:

> *"This section shall apply to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments ….."*

135. As such the Respondent's submission that the Payment was "*in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment"* must considered in light of the evidence before me.

136. Following the Appellant's end of year review in [redacted], in an email dated [redacted] to the Firm, the Appellant outlined his grievances and in particular the manner in which the Firm had treated him. A [redacted], Partner of the Firm, responded [redacted] and invited the Appellant *"to a meeting to discuss whether or not you should be subjected to disciplinary action".* If the Appellant's explanation was unacceptable to the Firm, an appropriate sanction would *"be applied in line with the disciplinary procedure."*

137. Following that letter, the dispute escalated prompting the Appellant's solicitor to inform the Firm by letter dated [redacted] that the Appellant had "*an actionable claim in defamation and for injury to his reputation …. in respect of which he will be holding* [The Firm] *fully accountable ".* As such, the Firm was therefore required to provide the following undertakings:

(a) to desist the disciplinary procedure
(b) to desist all victimisation and the ongoing campaign to injure or destroy the Appellant's professional reputation.
(c) to restore the Appellant's normal responsibilities and level of work
(d) to restore his rights in respect of agreeing and signing opinions and correspondence with clients.
(e) to repair the unjustified damage already inflicted on Appellant's professional reputation.

138. While the Appellant, at the time of his Solicitor's letter, had secured alternative employment, he continued with his claim for damage to his reputation. As a consequence, further discussions and negotiations ensued which ultimately led to the drafting and execution of the Compromise Agreement.

139. The underlying principle in the interpretation of contractual documents is to discern the intention of the contracting parties. In this regard, the intentions of the parties can be clearly established from the following clauses of the Compromise Agreement:

1.2 A number of disputes have arisen between the Employer and the Employee and the Employee has alleged, inter alia, that he has been defamed, victimised and that the Employer proposes to subject him to an unlawful disciplinary process. The Employer denies those claims in their entirety;

1.3 The Parties have agreed to settle all disputes between them on the following terms;

2.1 *The Employee will resign from his employment with the Employer with effect from* [redacted] *('the Termination Date')*

3.1 *The Employer agrees to pay and the Employee agrees to accept the sum of €180,000 gross in full and final settlement of all or any claims or entitlements (including the Employee's claims that he has been defamed and victimised) that the Employee may have howsoever arising out of or in connection with his employment with the Employer or the termination thereof against the Employer its partners, employees, servants or agents, whether at common law, in equity or under statute….*[Emphasis added]

….

3.5 *….. In consideration of the Agreement by the Employer to pay the Employee his basic salary between 1* [redacted] *and* [redacted] *the Employee agrees to work for the Employer for a maximum of five days in the thirty day period commencing on the Termination Date in the event that the Employer requires the Employee's advice or assistance in respect of which matters with which the Employee was involved during the course of his employment. The Employee will not be entitled to any additional remuneration for this work."*

3.7. *The payment at 3.1 above is made strictly without admission of liability on the part of the Employer."*

140. As such, the Compromise Agreement recognised at clause 1.2 the Appellant's assertions "*that he has been defamed and victimised*". However the key phrase in the Compromise Agreement justifying the payment of €180,000 is at clause 3.1 which attributes that consideration to "*any claims or entitlements ….. arising out of or in connection with his employment …. or the termination thereof".*

141. The Appellant's agent, [redacted], reviewed the Appellant's contract of employment and holiday entitlements and thereafter made a post settlement submission to the Respondent in which she calculated that the Appellant's salary entitlement was €55,000 or 4 months' salary made up as follows:

- Pay in lieu of Notice - 3 months' salary.
- Payment for days worked or to be worked - 8 days in the period [redacted] and an additional 5 days working at the request of the Firm.
- Holiday pay from [redacted] working out at 7 days.

142. [redacted] was of the view that there was no basis for allocating income in excess of the Appellant's strict contractual entitlement. As such the figure proposed by [redacted] contained the full allocation of the notice period and holiday entitlement, rounded up to twenty working days which was equivalent to a full month's salary.

143. There can be no criticism of [redacted]'s calculations which appeared to be based on specific factual circumstances, contractual and statutory entitlements. It is also relevant that [redacted]'s calculations were ventilated at the hearing with no challenge made to their accuracy.

144. As such, the Appellant's contractual and statutory entitlements at the 'Termination date' arising from his employment or termination thereof was €55,000. There was no evidence to suggest that the Appellant was entitled to anything else and it would therefore appear that the €55,000 should be assessed to tax under the general Schedule E charging provision TCA, 112. As such, I have found that the Appellant's contractual and statutory entitlement to €55,000 was associated with the termination of his employment.

145. In this regard, the Appellant did not have a contractual or statutory entitlement to the remaining €125,000 as a consequence of his resignation and therefore that amount must relate to settling the Appellant's claim that he was "*defamed*" thereby obviating the necessity of instituting proceedings in pursuing his claim to the High Court. As such TCA, section 123 could have no application to this element of the Payment as it was to settle "*all or any claims…. (including … that he has been defamed and victimised)… arising out of or in connection with his employment …. or the termination thereof"* in accordance with clause 3.1 of the Compromise Agreement and not "*in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment"* pursuant to TCA, section 123. As such and notwithstanding that the Appellant agreed to resign, the remaining element of €125,000 was in consideration of settling his "*claims*" against the Firm and assessable to tax under a different charging provision.

Injury or Disability – TCA, section 201

146. Notwithstanding my finding that none of the Payment falls within the charge to tax pursuant to TCA, section 123, it is necessary to consider the Appellant's submission that some of the Payment was exempt from tax in accordance TCA, section 201(2)(a)(i).

147. As considered above TCA, section 123 imposes a charge to tax under Schedule E in respect of, *inter alia*, compensation payments for loss of office where those payments would otherwise escape tax under the general charging provision, TCA, section 112. As such, income falling within the charge to tax in accordance with TCA, section 123 can be ameliorated by the exemptions and reliefs contained within TCA, section 201 and Schedule 3.

148. The Appellant was uncertain as to the exact amount of the Payment that related to defamation, victimisation, discrimination and the amount for retirement or removal from office. However at the end of his closing submission, the Appellant submitted "*that the correct figure for damages, if we could call it, defamation, is somewhere, it is about €80,000 and that for income it is somewhere between €55,000 and €100,000*".

149. Notwithstanding that uncertainty, the Appellant argued that payments governed by TCA, section 201 in respect of *"injury to*" the holder of an employment also applied to an individual's reputation and therefore exempt from tax.

150. However I am not in agreement with the Appellant's submission as the exemption governed by TCA, section 201(2)(a)(i) clearly applies to:

> *"an amount not exceeding €200,000 of any payment made—*
>
> *(I) in connection with the termination of the holding of an office or employment by the death of the holder, or*
>
> *(II) on account of injury to or disability of the holder of an office or employment"*

151. It is therefore clear from the statutory wording that the exemption from income tax only applies to payments in connection with death, injury and disability of the holder of an employment and cannot extend to an award for civil damages such as damages to a person's reputation which is a category of damages specifically exempt from tax in accordance with TCA, section 613(1)(c).

152. Furthermore and in accordance with the general principle of interpretation, *noscitur a sociis*, the interpretation of a word or phrase is affected by the words with which it is grouped. In the Court of Appeal of Singapore in *Public Prosecutor v Lam Leng Hung and others* - [2018] 4 LRC 54, the Court set out the jurisprudential history of the *noscitur a sociis* principle at para 108:

"Viscount Simmonds in the House of Lords decision of A-G v Prince Ernest Augustus of Hanover [1957] 1 All ER 49 at 53 provided a useful and vivid summation of the noscitur a sociis principle: '[W]ords, and particularly general words, cannot be read in isolation; their colour and content are derived from their context.' Diplock LJ (as he then was) in the English Court of Appeal decision of Letang v Cooper [1964] 2 All ER 929 at 937 remarked that the noscitur a sociis principle may be applied only if one 'know[s] the societas to which the socii belong'—in other words, the nature of the intended society (or societas) can only be gathered from the words used. Shortly put, the principle emphasises the relevance and importance of context in determining the intended meaning of a word or phrase."

153. Therefore as the exemption from tax applies to payment in connection with the death, injury to or disability of the office holder, I cannot accept the Appellant's argument that the purported damage to his professional reputation or claims of victimisation fall within the specific category of "*injury or disability"* as envisaged by TCA, section 201(2)(a)(i)(II).

154. Furthermore I agree with the Respondent that TCA, section 201(2)(a)(i)(II) applies to physical or psychological injuries which if in dispute, it is incumbent on those making the assertion to advance medical evidence. In this case, there was no evidence of psychological injury. In fact, the Appellant appeared to be a capable [redacted] well accustomed to the rough and tumble of commercial life. Furthermore the Appellant also confirmed in evidence "*Now, I'm not a crier, I do not feel, to someone like me, that I would be very damaged by the types of things that happen to me, whilst they may have affected a different person differently and they may suffer more. But my chief concern was the damage to reputation. And that was growing."*

155. It is also relevant that while the Appellant claimed that his reputation was damaged, undermined and discredited, such purported damage did not prevent him from securing alternative employment at the height of the dispute with the Firm.

156. Furthermore, TCA, section 201(2)(a) is only applicable if the payment falls within the initial charge to tax pursuant to TCA, section 123. As considered above, no element of the Payment falls within the charge to tax pursuant to TCA, section 123. It is also relevant that as the Appellant is asserting that a certain element of the Payment related to a capital payment governed by TCA, section 613, he cannot succeed in his claim for the income exemption pursuant to TCA, section 201.

157. Therefore, in light of the all of my findings, I cannot accept that any part of the Payment falls within the exemption to income tax governed by TCA, section 201(2)(a)(i)(II).

Payment under employment legislation to protect employees - TCA, section 192A

158. TCA, section 192A provides for an exemption from income tax for compensatory awards received by an employee where an employee's rights and legal entitlements under employment law have been breached. Examples of breaches in employment law include discrimination, harassment, victimisation or non-compliance by an employer with statutory requirement. As such, the following payments exempt from tax envisaged by that section include:

(a) A payment made in accordance with a recommendation, decision or a determination by a *'relevant authority'* in accordance with the provisions of '*relevant Act'* to an employee or former employee by their employer or former employer (subsection 2), or

(b) A payment made in accordance with a settlement arrived at under a mediation process provided for in a '*relevant Act'* as if it had been made in accordance with a recommendation, decision or determination under an act of a '*relevant authorit*y' (subsection 3), or

(c) A payment under an agreement evidenced in writing in settlement of a claim which had it not been settled by the agreement would have likely been the subject of a recommendation, decision or determination under a '*relevant Act'* by a '*relevant authority'* (subsection 4)

159. The Appellant submitted that some of the Payment related to victimisation but was unable to quantify an amount and he acknowledged at the hearing "*that* [redacted] *mentioned only defamation in his opinion, but that was chief in our minds, because we knew it was by far the biggest payment, biggest part of the payment made, and, if we succeeded on that, all the other issues fell away….. as I've said before, I don't think this concerns very large amounts of money. When I approached Revenue first to ask it to re open its ruling, I put the accent heavily on defamation. The reason being was that this was in the order of, and as* [redacted] *says, €80,000. If we succeeded with that, with the allowances etc. that were available without any special allowances for victimisation or discrimination, the entire amount would be almost free from tax."*

160. Therefore the Appellant made no substantial submissions to justify his entitlement to exemption from tax pursuant to TCA, section 192A. On the contrary, he suggested that I exercise my discretion in determining the amount to be considered to be in respect of discrimination and victimisation. However at the hearing I reminded the Appellant, that the Tax Appeals Commission was "*a fact finding tribunal and I can be judicially reviewed if I kind of go off script and work outside of facts, so I need facts and evidence supporting the facts.*"

161. Furthermore Counsel for Respondent in her submissions was not certain "*to what extent* [the Appellant] *is pushing section 192A. Obviously it was in his submissions and it formed a large part of his submissions. But I think, on the basis of what he is saying today, he's saying that only a small portion of the payment would come within this section. But, in any event, I think it's helpful that we go through it and to see, as I say, to what extent he's actually pushing this point*."

162. As such and notwithstanding the uncertainty of the Appellant's submission, there was no evidence that any part of the Payment related to:

(a) *a payment made under a recommendation or decision made by a 'relevant authority'*, under a *'relevant Act'* or
(b) a payment made in accordance with a settlement arrived at under a process of mediation provided for under a '*relevant Act'* or
(c) a payment made under a written agreement, had it not been settled by agreement, is likely to have been determined by a *'relevant authority'* had the matter proceeded to that authority.

163. On this basis I am unable to determine that any part of the Payment should be exempt from tax in accordance with TCA, section 192A.

Damage to Reputation – TCA, section 613

164. [redacted] SC who represented the Appellant in the negotiation and finalisation of the Compromise Agreement was of the view "*that a sum of €80,000 could fairly be apportioned to the settlement of his claim in respect of defamation and injury to his reputation, and that the balance of €100,000 represented a payment in the nature of a severance payment, or otherwise represented remuneration that would be liable to income tax subject to allowances in the ordinary way.*"

165. The Defamation Act 2009, section 6(2) defines the tort of defamation as *"the publication, by any means, of a defamatory statement concerning a person"*. The

purpose of the Act is to provide protection to a person's good name and reputation. In order to succeed in a defamatory action, it is necessary to prove that the publicised accusation is false or malicious and has damaged the person's good name.

166. As observed above, there was no evidence that the Appellant's good name was undermined or in any way adversely effected. Furthermore and as the Appellant is aware, in order to succeed with a defamatory action, it is necessary to prove in the High Court that the publicised accusation is false or malicious and has damaged the person's good name. As the matter did not proceed to court, it is not possible to determine whether the Appellant had been defamed. Furthermore there are many statutory defences that can be raised in response to an action in defamation. It is also relevant that during the disagreement with the Firm, the Appellant had received an offer to take up an employment with another firm of [redacted] and therefore his reputation could not have been that adversely effected. As such, I am of the view that no part of the Payment could be considered to be "*compensation or damages for any wrong or injury suffered by an individual in his or her person or in his or her profession*" in accordance with TCA, section 613(1)(c).

Right to sue

167. As the Appellant's dispute with the Firm escalated in [redacted] and resolved by [redacted], there could be no doubt that pragmatism played a crucial role in the parties' ability to quickly resolve the matter. From the Firm's perspective, the adverse publicity associated with High Court litigation together with the possibility of the public ventilation of commercially sensitive information would have acted as a deterrent in the decision to defend defamation proceedings arising from a dispute between an employee and employer. Furthermore it also reasonable to assume that that the Firm would have considered the time in preparing for and attending court, the risk of losing and the exposure to damages in excess of the €180,000 together with the costs of defending the action.

168. As such, to resolve the dispute, clause 2.1 of the Compromise Agreement required the Appellant to resign from the Firm. However, as specified at clause 3.1 of the Compromise Agreement, the consideration of €180,000 was "*in full and final settlement of all or any claims or entitlements …. that the Employee may have howsoever arising out of or in connection with his employment or the termination thereof …"* Therefore as considered above, while €55,000 of the Payment related to the Appellant's entitlement to remuneration, the remaining €125,000 related to the "*claims … arising out of or in connection with his employment or the termination*

thereof" and not as a consequence or as an entitlement derived from his resignation from the Firm.

169. At the hearing, I suggested that the Appellant may have received an element of the Payment to extinguish his lawful entitlement to initiate proceedings against the Firm and as a consequence fell within the charge to tax as a "*capital sums received in return for forfeiture or surrender of a right or for refraining from exercising a right"* pursuant to TCA, 535(2)(a)(iii). I also referred the parties to the decision of the English High Court in *Zim Properties v Procter* [1985] STC 90 where the Court considered the equivalent statutory provision of TCA, 535 and held that where there was a right to bring an action seeking to enforce a claim, which might not succeed but which was neither frivolous nor vexatious, and that right could be turned to account by negotiating a compromise yielding a capital sum, it was held that the right to sue constituted an asset for capital gains tax purposes.

170. Counsel for the Respondent argued that *Zim Properties* was not relevant as the Appellant never threatened to sue the Firm. However it is clear from the Appellant's evidence and the Opinion of [redacted] SC dated [redacted] that "*we were purporting to institute proceedings against* [the Firm]*, but the necessity of instituting proceedings was obviated by the execution of a settlement agreement* [redacted] [sic]*."* [redacted] also opined that the Appellant had "*an accrued cause of action which, if successful, would have entitled him to an award of general damages. A payment made in settlement of that cause of action is wholly distinct from any payment in the nature of a severance payment…. It is my opinion that* [the Appellant's] *claim for defamation or injury to his reputation had, conservatively, a value of €80,000."*

171. Notwithstanding the Respondent's submission, I have no doubt that based on the Appellant's evidence and the opinion of [redacted], that the Appellant had a right of action to sue the Firm. That right was a chose in action and falls within the definition of asset in accordance with TCA, section 532 which defines an asset as *"All forms of property shall be assets for the purposes of the Capital Gains Tax code whether situate in the State or not*" and TCA, section 535(2)(a)(iii) as a capital sum "*received in return for forfeiture or surrender of a right or for refraining from exercising a right"* as applied by the English High Court in *Zim Properties*.

172. As discussed above, I am of the view that it would have been uppermost in the minds of the partners of the Firm to avoid the adverse publicity associated with any purported unlawful treatment of one of its employees. While the evidence of the Appellant was that his Counsel had estimated a sum of €400,000, the Appellant

ultimately accepted €180,000 together with a contribution to his legal costs of €22,500 plus VAT.

173. In light of the above, I am of the view that while the sum of €55,000 related to his contractual and statutory entitlement as a consequence of his resignation, the remaining element of the Payment amounting to €125,000 is not assessable to income tax but to capital gains tax pursuant to TCA, section 535(2)(a)(iii). In coming to my determination I have exercised my statutory mandate to do such things considered "*conducive to the resolution of disputes between appellants and the Revenue Commissioners and the establishment of the correct liability to tax of appellants*" pursuant to Finance (Tax Appeals) Act 2015, section 6(2)(l). As such, the Appellant's tax return should have included €55,000 as a payment within the charge to income tax pursuant to TCA, section 112 and the balance of €125,000 reported as a capital gain and taxed accordingly.

Determination

174. Having considered the evidence and submissions of the parties, I have determined that in accordance with TCA, section 949AK, the assessment to income tax for the year [redacted] should be amended to exclude €125,000 from the charge to income tax with the balance of the Payment of €55,000 subject to tax in accordance with TCA, section 112.

Conor Kennedy
Appeal Commissioner
28th July 2021

No request was made to state and sign a case for the opinion of the High Court in respect of this determination.